IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1246

ROBERT W. EMERSON and
JOHNNY M. HILL,

Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AUTHORITIES CITED

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Robert W. Emerson and Johnny M. Hill, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case on January 5, 1977, and the petition for rehearing having been denied on February 7, 1977.

OPINION BELOW

The opinion of the Court of Appeals appears at 545 F.2d 1297, and is reproduced at p. 1a, *infra*. The order denying the petition for rehearing is not reported, but appears at p. 2a, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition for certiorari was filed less than 30 days after the Court of Appeals entered its final order in the case.

QUESTIONS PRESENTED

1. Whether the trial court's summary refusal of the petitioners' request to ask the veniremen their religious preference violated the petitioners' Sixth Amendment right to a trial by an impartial jury?

2. Whether a sentence which is based in part on the petitioner's insistence on a jury trial and on his refusal to acknowledge his guilt at the sentencing hearing is violative of the petitioner's rights under the Fifth, Sixth and Eight Amendment rights?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty . . . without due process of law . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Nature of the Case

The petitioners were convicted of possessing beef which had been stolen from an interstate shipment.

Chester Dale Roberts, a truck driver, with the aid of Max Allen Vaughn, Steven Ross Vaughn, Bobby Sims, James Byron Archer and Robby Joe Harden, diverted a cargo of beef entrusted to him for delivery in Chicago, sold the beef at various locations in north Texas, and converted the proceeds to their own benefit. According to these individuals, the petitioners received from 7,500 to 10,000 pounds of the beef. The petitioners denied receiving the beef.

Facts Pertinent to Questions Presented

1. Prior to trial the petitioners submitted to the trial court a list of twelve questions to be put to the jury panel. One of the questions was: "Would each member of the jury panel please state his religious preference?" Record on Appeal, vol. I, p. 18, No. 76–2620, 5th Cir. (hereafter "I Rec."). Thereafter, but prior to the trial court's voir dire examination of the jury panel, the court told petitioners that she would not request the veniremen to state their religious preference. The voir dire examination of the panel, which was conducted exclusively by the trial court, establishes that she did not honor the petitioners' request respecting the veniremen's religious preferences. II Rec. 9–23.

2. The evidence adduced at trial, in the pre-sentence report and at the sentencing hearing revealed that the petitioner Emerson had no criminal background; was a well respected, civic-minded, long-time resident of Midlothian, Texas; and that his involvement in the offense was limited (he purchased 25% of the beef stolen by others), as compared to the involvement of the Vaughns, Roberts, Harden and Sims.

During the sentencing proceedings Emerson advised the court that he was "terribly disappointed and confused, because [he had] been convicted of a criminal case of which [he was] innocent." III Rec. 853. Shortly thereafter, the court made the following remarks:

> Now, Mr. Emerson, I believe that the jury verdict was correct, and I think that until you understand that it was correct you are never going to change. I don't

> like the way you have conducted your business. You are not, in my opinion, a person for probation. But I think if I put you on probation you would go ahead and do the same thing that you have been doing.
>
> I sentence you to three years in the custody of the Attorney General and recommend that you go to Texarkana.

III Rec. 857–58.

Of the eight people involved in this case–the petitioner, the Vaughns, Archer, Harden, Roberts and Sims–at least three who aided in disposing of the stolen meat were not charged with a crime as a result of their participation in the transaction (Steven Vaughn, II Rec. 36; Harden, II Rec. 39–40; and Sims, IIRec. 38–39, 157); Archer who helped steal the beef and who helped dispose of the beef, plead guilty to one count of a two count indictment (the second count was dismissed) and was assessed a three year probated sentence. II Rec. 37–38, 222–24. Roberts, who stole the beef and helped to sell it, and Max Allen Vaughn, who also helped to dispose of the beef, had both plead guilty to one offense growing out of the transaction in question but had not been sentenced at the time of the petitioners' trial. II Rec. 30, 40–41, 49–50, 361–62.

REASONS FOR GRANTING THE WRIT

I.

The first question presented raises serious issues concerning an accused's right to put to prospective jurors a general inquiry regarding their religious preference for purposes of exercising peremptory challenges.

The examination of prospective jurors is essential to the fairness of jury trials because the information elicited on voir dire examination aids counsel in the exercise of peremptory challenges and aids the court in determining the competence of the veniremen to serve. An intelligent exercise of peremptory challenges and proper rulings on challenges for cause depend upon the knowledge that counsel and the court gain about each venireman during voir dire examination. Thus, if the voir dire examination is deficient, the impartiality of the jury may easily be compromised. To avoid any deficiency, "[t]he voir dire in American trials tend to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted." Swain v. Alabama, 380 U.S. 202, 218–19 (1965). "[V]oir dire examination must be given a wise and liberal scope. Reasonable latitude must be indulged to inquiry into attitudes and inclinations in order to assure the objectivity of the jurors ultimately chosen." United States v. Peterson, 483 F.2d 1222, 1227 (D.C. Cir. 1973). The importance of peremptory challenges—and thus the need for "extensive and probing" voir dire examinations—is amply asserted in *Swain*.

> The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory

> challenge is a necessary part of trial by jury. See Lewis v. United States, 146 U.S. 370, 376. Although "[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] grant peremptory challenges," Stilson v. United States, 250 U.S. 583, 586, nonetheless the challenge is "one of the most important of the rights secured to the accused," Pointer v. United States, 151 U.S. 396, 408. The denial or impairment of the right is reversible error without a showing of prejudice, Lewis v. United States, 146 U.S. 370: Harrison v. United States, 163 U.S. 140; cf. Gulf, Colorado & Santa Fe R. Co. v. Shane, 157 U.S. 348. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." Lewis v. United States, 146 U.S. 370, 378.

380 U.S. at 219.

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, supra, 380 U.S. at 220. Accordingly, a peremptory challenge "is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another', '. . . upon a juror's habits and associations,' . . . or upon the feeling that 'the bare question [a juror's] indifference may sometimes provoke a resentment,' . . . It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality,

occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." *Id.*, at 220-21. It is clear from the expressions in *Swain* that an accused is entitled reasonable latitude in questioning prospective jurors in order that his peremptory challenges might be exercised meaningfully and intelligently. The only issue to be resolved in this case is whether an accused has the *absolute* right to inquire of the veniremen's religious preference.[1]

In Aldridge v. United States, 283 U.S. 308 (1931), this Court said that "[t]he right to examine jurors on the voir dire as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character." 283 U.S. at 313. Again in Dennis v. United States, 339 U.S. 162 (1950), this Court pointedly mentioned religion as one of the factors in voir dire examination and the exercise of peremptory challenges. 339 U.S. at 168. And again in *Swain* the Court remarked that peremptory challenges were "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, *religion*, nationality, occupation or affiliation of people

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[1] If religion were an issue in this case, the petitioners would be arguing a right to make voir dire inquiry regarding religious preference in order to establish actual bias. Cf. Dennis v. United States, 339 U.S. 162, 168 (1950). Since religion was not an issue in the case, the petitioners' contention is limited to whether they had an absolute right to know the jurors' religious preference to exercise their peremptory challenges.

summoned for jury duty." 380 U.S. at 220. (Emphasis added). Although the issue presented by the petitioners was not present in *Aldridge*, *Dennis* or *Swain*, and there was thus no need for the Court to discuss religion as a basis for exercising peremptory challenges, the Court nevertheless classified religion along with race as a significant basis for the exercise of peremptory challenges. Having been grouped together by the Court, religion and race appear to be treated synonomously insofar as voir dire examination and the exercise of peremptory challenges is concerned. Accordingly, for the reasons stated in *Aldridge* and *Swain*, an accused's right to know each prospective juror's religious preference needs no justification, reason or explanation; the right is absolute. "It is well known that these factors (i.e., race, religion, nationality, occupation or affiliations) are widely explored during the voir dire, by both prosecutor and accused". *Swain*, supra, 380 U.S. at 221.

The petitioners timely and properly requested the trial court to ask each venireman his religious preference. The request was denied, and the petitioners were forced to select their jury, i.e., to exercise their peremptory challenges, without knowing the religious preference of each prospective juror. The action of the trial court did not comport with the expressions in *Swain* that factors such as religious preference "are widely explored during voir dire, by both prosecutor and accused", 380 U.S. at 221, that "[t]he voir dire in American trials tends to be extensive and probing", 380 U.S. at 219, or the rationale of *Aldridge* that an accused has the right to examine prospective jurors on voir dire as to religious preference because there is no justification for the risk in forbidding the inquiry. 283 U.S. at 313–14.

A writ of certiorari should be granted in this case to determine whether the expressions of this Court regarding voir dire examination and the exercise of peremptory challenges accord an accused an absolute right to know the religious preference of the persons summoned for jury duty in his case. Determination of the issue does not require an enlargement or extension of the holdings of *Aldridge, Dennis* and/or *Swain*; however, a determination of the issue is essential to a complete understanding of *Swain* and to preserve an accused's right to a trial by an impartial jury. "This Court has held that the fairness of trial by jury requires no less" than a wide exploration during the voir dire examination of many factors including religion. *Swain*, supra, 380 U.S. at 221.

II.

The second question presented combines issues involving the right to a trial by jury, the privilege against compulsory self-incrimination and the propriety of the punishment assessed.

The petitioner Emerson received a significantly greater sentence than others who were involved in the same criminal action even though Emerson had no prior criminal record (while some of the others who were treated more favorably had extensive prior criminal records) and even though Emerson was less culpable than some of the others. See pp. 4–6, *infra*. Ordinarily the imposition of disparate sentences is not an issue for appellate review, let alone one of constitutional dimension, the colloquy between Emerson and the trial court at the sentencing proceedings gives rise to the reasonable belief that Emerson was punished not only for his guilt of the offense for which the jury convicted him but also because he refused to acknowledge

his guilt to the judge at the time sentence was assessed. See pp. 4–5, *infra*.

The Court of Appeals for the Seventh Circuit was confronted with a case remarkably similar to the case at bar in Wiley v. United States, 267 F.2d 453 (7th Cir. 1959), opinion following remand, 278 F.2d 500 (7th Cir. 1960). Wiley, like the petitioner Emerson, was convicted upon his plea of not guilty of possession of goods taken from an interstate commerce shipment. Like Emerson, Wiley was not involved in the theft of the goods and compared to others involved in the crime he had "a minor participation". *Wiley, supra*, 278 F.2d at 501. Like Emerson, Wiley had no prior criminal background and appeared to be a responsible person. Like Emerson, Wiley received a heavier sentence than the co-defendant who actually stole the goods received, and a heavier sentence than was assessed other co-defendants who were minor participants, all of whom plead guilty.

The Court of Appeals noted that the severity of the sentence imposed on Wiley was irrelevant in deciding the appeal, but that the disparity of the sentences assessed Wiley and the other co-defendants was relevant in determining the propriety of the sentence assessed Wiley. *Wiley*, supra, 267 F.2d at 456. The Court concluded that the only basis for the disparity in the sentences imposed was Wiley's insistence on a trial, and that a sentence which is based, even in part, upon an accused's request for a trial cannot stand.

> Our part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his

> effort proves unsuccessful. It is evident that the punishment imposed by the district court on Wiley was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted.

Wiley, supra, 278 F.2d at 504. See also United States v. Tateo, 214 F. Supp. 560 (D.C.N.Y. 1963), expressing the view that a trial court's announced intention to assess the maximum punishment in the event the accused pleads not guilty, regardless of the evidence of guilt or innocence, is coercion as a matter of law.

The petitioner Emerson had a constitutional right to a trial by jury and to plead not guilty. U.S. Constutition Amendment VI. His exercise of that right was abridged when the trial court assessed him a significantly more severe sentence than was awarded guilty-pleading co-defendants whose criminal backgrounds were more extensive and whose involvement in the crime was much more extensive and culpable. As in Wiley, there is no othe reason to support the disparate sentences the trial court assessed Emerson and the other co-defendants.

The colloquy between the trial court and the petitioner Emerson also suggests that Emerson's claim of innocence at the sentencing hearing may have caused the trial court to impose a more severe sentence on Emerson. Unlike the petitioner Hill, Emerson volunteered at the sentencing hearing that he was innocent and that he was displeased with the jury's verdict. In response to this the trial court said: "I believe that the jury verdict was correct, and I think that until you understand that it was correct you are

never going to change." Thereafter, the trial court assessed Emerson's sentence.

Implicit in the trial court's response is the conclusion that had Emerson admitted his guilt of the offense during the sentencing proceedings, he would have been given either a probated sentence or a shorter sentence involving incarceration. Thus, the imposition of the three year sentence may, in part, have resulted from Emerson's failure to admit his guilt to the trial court during the sentencing proceedings. To the extent that the sentence is so predicated, the sentence violates Emerson's right to be free from compulsory self-incrimination in two particulars. First, if Emerson would have admitted his guilt during the sentencing proceedings in the hope of receiving a less severe sentence, he would have exposed himself to a perjury prosecution. His testimony at the trial directly flew in the fact of any admission under oath that he was guilty. Secondly, Emerson had the right to refuse to admit his guilt at the sentencing proceeding and had the right to be free from having that refusal used against him as a basis for punishing him. Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967). Upon the same rationale that the Court of Appeals in *Wiley* concluded that a sentence based in part upon an accused's exercise of his right to a trial is impermissible, so a sentence which is based in part upon an accused's failure to admit his guilt at sentencing proceedings following an unsuccessful defense of the charges against him is an impermissible abridgement of the protection afforded by self-incrimination clause of the Fifth Amendment.

A writ of certiorari should issue in this case to resolve the inconsistency between the Seventh Circuit and the Fifth Circuit with respect to the validity of imposing a sentence based in part upon an accused's insistence upon a trial; to determine whether it is proper for a trial court to assess a sentence based in part upon an accused's refusal to acknowledge his guilt at a sentencing proceeding after pleading not guilty; and finally to determine whether the imposition of a sentence, based in part on the accused's insistence upon a trial and based in part of the accused's failure to acknowledge his guilt at the sentencing proceeding after trial, which sentence is more severe than sentences imposed on guilty-pleading co-defendants who are more culpable than the accused, constitutes cruel and unusual punishment.

CONCLUSION

For the reasons stated herein the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 76–2620
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT W. EMERSON and JOHNNY M. HILL,

Defendants-Appellants

Appeal from the United States District Court for the Northern District of Texas

(January 5, 1977)

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges:

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

APPENDIX B

United States Court of Appeals

Fifth Circuit

Office of the Clerk
February 14, 1977

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

No. 76–2620–USA v. Robert W. Emerson and Johnny M. Hill

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By: /s/ Susan M. Geavers
Deputy Clerk

/smg

cc: Mr. Melvyn Carson Bruder
Ms. Judith A. Shepherd

No. 76-1246

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals issued no opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1977. A petition for rehearing was denied on February 14, 1977. The petition for a writ of certiorari was filed on March 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in refusing to ask members of the jury panel on *voir dire* to state their religious preference.

2. Whether petitioner Emerson's sentence was lawful.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of possessing goods stolen from an interstate shipment, in violation of 18 U.S.C. 659. Petitioner Hill was sentenced to imprisonment for four years, six months of which was to be served in confinement, with the balance suspended. Petitioner Emerson was sentenced to imprisonment for three years (Tr. 857-858). The court of appeals affirmed by a *per curiam* order (Pet. App. A).

In March 1975, co-defendant Vaughn contacted petitioner Emerson, owner of a butchering establishment near Dallas, Texas, concerning the disposition of some stolen beef that he expected to have the following week. Emerson indicated interest, and Vaughn talked with petitioner Hill, an employee of Emerson, about the matter (Tr. 46, 62-63). On March 16, co-defendants Archer and Roberts, using a truck belonging to one Young, received some 37,000 pounds of beef in Plainview, Texas, which was to be delivered to a packing house in Chicago, Illinois. They drove the truck to Dallas and notified Vaughn (Tr. 55-57, 223-224, 363). Thereafter Vaughn, Archer, Roberts, and one Sims met petitioner Emerson near the latter's place of business. Emerson rejected Vaughn's quoted price of 55 cents a pound, claiming he could buy legitimate meat for less than that. When Vaughn lowered the price to 35 cents a pound, Emerson agreed to have the beef inspected. Emerson was assured that there would be a delay in reporting the theft, so that he would have time to move the meat (Tr. 58-70, 158-159, 226-229, 365).

After Hill inspected and approved the beef, all but a small quantity was delivered to Emerson's place of business on the night of March 19 (Tr. 73-79, 82-101, 145, 163-177, 224, 237, 302-305, 367-375). Emerson paid only 25 cents a pound,

making payment in $20 bills (Tr. 101). When Young, the owner of the truck, informed Vaughn that he had reported the shipment as stolen, Vaughn got in touch with Emerson, who said that he had already moved the meat (Tr. 103).

ARGUMENT

1. Before *voir dire* of the jury panel, the court refused a defense request to ask the veniremen their religious affiliations. The colloquy on this issue was as follows (Tr. 8-9):

> THE COURT: Probably the only other question that you have down here that I won't ask, Mr. McCorkle—I say, about the only question here that I see that I am not going to ask is the religion of each one of them. Now, is there any special reason that you want that?
>
> MR. McCorkle: No, Your Honor, it's just a matter of a habit of mine.
>
> THE COURT: All right. Well, I think that the rest of that I will ask.

The well recognized discretion of the trial court in these matters was not here abused, especially in the absence of any specific reason for the request. Petitioner concedes that religion was not an issue in the case (Pet. 8 n. 1), and fails to suggest how answers to such a question could have assisted him in the exercise of his peremptory challenges. "The Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him." *Ristaino* v. *Ross*, 424 U.S. 589, 594. As the court ruled in *Yarborough* v. *United States*, 230 F. 2d 56, 63 (C.A. 4),

certiorari denied, 351 U.S. 969, in considering a similar claim:

> No matter of any religious significance whatever was involved in the case; and appellant does not show how he could have been prejudiced in any way by the refusal of the judge to make inquiry of the jurors as to a private matter of this sort. There is nothing to show that he belonged to any religious sect or was charged with a crime as to which any sect held views different from the rest of mankind * * *.

See also *Pope* v. *United States*, 372 F. 2d 710, 725-727 (C.A. 8); *Gold* v. *United States*, 378 F. 2d 588, 594 (C.A. 9). Indeed, the inability of counsel to assign any reason for propounding such a question to the venire was sufficient ground to refuse the request. *Connors* v. *United States*, 158 U.S. 408, 415.

This Court's recognition in *Swain* v. *Alabama*, 380 U.S. 202, 220 that peremptory challenges are "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned to jury" does not change this result. The trial court has ample discretion to limit *voir dire*. That discretion was not abused here.

2. Petitioner Emerson challenges the sentence imposed on him on several grounds. He claims the sentence was cruel and unusual punishment because it was more severe than that imposed on his assertedly more culpable co-defendants (Pet. 14); he also claims the sentence was increased over what it would otherwise have been because he exercised his right to trial (Pet. 10-12), and because he continued to assert his innocence at the sentencing hearing (Pet. 12-13).

a. Petitioner's contention that his sentence was unduly harsh does not present an issue worthy of review by this Court. His three-year sentence was well below the statutory maximum of ten years' imprisonment and a $5,000 fine. See 18 U.S.C. 659. Furthermore, petitioner is wholly incorrect in asserting that his co-defendants were more culpable than he. There were eight people involved in the case. Three of them—Steven Vaughn, Robby Joe Harden and Bobby Sims—were teenagers who merely earned some money by unloading the beef from the truck into petitioner Emerson's store. (Tr. 318-360, 307-318, 156-221). Indeed, Sims testified he did not even know the beef was stolen (Tr. 183). These peripheral actors were apparently not charged.[1] James Archer drove the load of meat from Plainview, Texas, to petitioner's store and knew the beef was stolen (Tr. 221-247, 270). Archer pleaded guilty to charges arising out of the theft and received "a three-year probated term" (Tr. 37-38). Petitioner Hill was a 27-year old employee of petitioner Emerson (Tr. 730-730A) whom the court found to have been "too easily influenced" by Emerson (Tr. 858); Hill received six months' imprisonment and three and one half years' probation (*ibid.*). Emerson, who operated three beef stores (Tr. 609) and purchased the meat involved in this case knowing it to have been stolen, was sentenced to three years' imprisonment.[2]

We believe it is entirely reasonable that a substantial businessman who knowingly provides an outlet for disposal of stolen goods—and whose role is just as critical to the criminal activity as that of the thieves themselves—should receive a sentence such as that imposed on

---

[1]Sims testified he was not charged (Tr. 157). Petitioner states that Steven Vaughn and Robby Harden were not charged (Pet. 5).

[2]Two other defendants, Roberts and Max Vaughn, had not been sentenced at the time petitioner was sentenced, and this record does not reveal the ultimate disposition of their cases.

petitioner Emerson here, while those who handled the goods in transit after their theft receive lesser sentences. The matter is within the sound discretion of the trial court.

b. The following exchange took place at the sentencing hearing (Tr. 853-854):

> Q (By the Court) Mr. Emerson, would you like to speak?
>
> A Yes, Your Honor. I would like to say that at this point, I am terriby disappointed and confused, because I have been convicted of a criminal case of which I am innocent. And I am a little bit disturbed at myself that I took this matter so lightly for so long, because I thought that sooner or later the truth or the lack of the truth would come to the surface. I guess I had this conviction because of the way that I was reared, that the truth would always come first. But as I left the Courtroom here about a month ago I realized on that particular incident that the truth did not quite win out, as they showed in eight hours of deliberation over a simple matter as did we steal it or not.
>
> But since that time the truth, I think, has won, in that I know myself, my family has convinced me that they also know the truth, and my friends.
>
> Q What are you saying to me, Mr. Emerson, that the jury verdict was not correct?
>
> A That's right, Your Honor.

The court questioned Emerson about financial matters, and Emerson's attorney addressed the court, asking for

a sentence of probation (Tr. 854-857). The following colloquy then occurred (Tr. 857):

> THE COURT: All right. Mr. Emerson, will you stand up, please?
>
> Now, Mr. Emerson, I believe that the jury verdict was correct, and I think that until you understand that it was correct you are never going to change. I don't like the way you have conducted your business. You are not, in my opinion, a person for probation. But I think if I put you on probation you would go ahead and do the same thing that you have been doing.

A sentence of three years' imprisonment was then imposed.

While we agree that a court cannot in sentencing penalize the defendant for exercising in good faith his right to trial (see, *e.g., United States* v. *Wiley*, 267 F. 2d 453 (C.A. 7)), there is no indication on this record that the court acted out of such motive. Unlike in *Wiley, supra,* where the district court announced its "standing policy" that it would not consider an application for probation from a defendant who pleads not guilty and stands trial (267 F. 2d at 455), this record is devoid of any indication that the trial court based its refusal to grant probation on petitioner's exercise of his right to trial. Petitioner, in apparent recognition of the absence of any evidence to support his claim, argues only that there can be "no other reason" to explain the disparity between the sentence given to him and those given his co-defendants who pleaded guilty (Pet. 12). But if a showing of a sentencing disparity alone were sufficient to make out an abridgement of the right to trial, no court could ever award a defendant who went to trial to a sentence more severe than it had awarded a co-defendant who pleaded guilty. Such a proposition is obviously untenable; it ignores degrees of culpability and would if adopted deprive the sentencing

court of much of its traditional discretion to tailor the punishment to the criminal as well as to the crime.[3]

3. Petitioner fares no better with his argument that his sentence was made more severe because he maintained his innocence before the court at the sentencing hearing; this, he asserts, infringed his right against compelled self-incrimination (Pet. 12-13). In the first place, of course, petitioner was not compelled to restate his belief in his innocence or to say anything at all. The court asked him if he "would * * * like to speak" (Tr. 853), and thus his statement was entirely voluntary.

Nor has petitioner demonstrated that, quite apart from consideration of his right against self-incrimination, his

[3]Although none would dispute the proposition that a defendant should not be penalized at sentencing for demanding that the prosecution carry its burden of proving his guilt at a trial, the converse of this proposition—that no defendant should be shown leniency on account of a willingness to plead guilty—does not necessarily follow. A plea of guilty, in addition to conserving the scarce resources of the criminal justice system, may often be viewed by the sentencing judge as reflecting a recognition of wrongdoing by the defendant, an expression of contrition for his acts, and a start on the path to rehabilitation—all factors that are generally recognized as legitimate bases for ameliorating a sentence.

But these are, of course, two sides of the same coin, so that what appears in the case of many guilty-pleading defendants to be a reasonable recognition of factors justifying some extension of leniency appears to their co-defendants who have stood trial and received a heavier sentence to be the infliction of a penalty for the exercise of a right. We believe that in cases exhibiting such disparities an appellate court may properly afford relief only where there is, as in *Wiley*, concrete evidence that the sentencing judge has applied some policy plainly embodying a penalty for refusing to plead guilty, and petitioner has cited no cases holding otherwise. In the instant case, petitioner can point to no evidence other than the disparity itself (which may in any event be accounted for by the sentencing judge's perception of defendants) to suggest that his sentence contains an element punishing him for insisting upon trial.

sentence was made more severe because he chose to reassert his innocence. As the colloquy quoted above shows, the court denied probation because "if I put you on probation you would go ahead and do the same thing that you have been doing" (Tr. 857). Thus, the refusal to place petitioner on probation was a permissible exercise of the court's discretion. Although the court did remark that "until you understand that [the verdict] was correct you are never going to change" (*ibid.*), its decision to refuse probation cannot be said to rest on that ground. Even if it did, the sentence would not be subject to challenge. If a court can properly consider a defendant's remorse as a factor in mitigation of punishment, it necessarily may consider the absence of remorse implicit in a continued assertion of innocence in refusing to mitigate. See footnote 3, *supra*.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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